Supreme Court, U.S.
FILED

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No. (1) 09-157 AUG 5 - 2009

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In The

# Supreme Court of the United States

JINGHAI LI,

*Petitioner,*

v.

ERIC H. HOLDER, JR., Attorney General,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a due process claim of ineffective assistance of counsel must be administratively exhausted at the Board of Immigration Appeals ("BIA") where the BIA lacks jurisdiction to adjudicate constitutional issues.

2. Whether Petitioner should be faulted for failing to raise ineffective assistance of counsel at the BIA where the attorney representing him before the BIA was the same attorney who failed to provide effective assistance of counsel below.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jinghai Li, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The order of the Court of Appeals is an unreported decision in civil case no. 04-73949 before the Ninth Circuit (App. B). The decisions of the Board of Immigration Appeals and the Immigration Judge are unpublished.

## JURISDICTION

The Court of Appeals entered its judgment on January 5, 2009 (App. B) and denied Petition for Rehearing and Petition for Rehearing *en banc* on May 7, 2009 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1252(d)(1) provides in relevant part:

(d) Review of final orders

A court may review a final order of removal only if –

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

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## STATEMENT OF THE CASE

### A. Basis for Federal Jurisdiction

The Ninth Circuit Court of Appeals properly exercised jurisdiction in this case by reviewing the BIA's decision as to asylum and withholding of removal pursuant to §§ 242(a) and 242(b) of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1252(a) and (b). The Ninth Circuit also has jurisdiction to review a claim under the Convention Against Torture ("CAT") pursuant to § 2242(d) of the

Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), the Convention's implementing legislation. Venue was proper in the Ninth Circuit under INA § 242(b)(2), 8 U.S.C. § 1252(b)(2) because the administrative proceedings before the Immigration Judge ("IJ") were conducted in Los Angeles, California.

Petitioner invokes the jurisdiction of this Court on application for writ of certiorari, pursuant to Supreme Court Rule 10(a). The Ninth Circuit's decision that Petitioner was barred from raising ineffective assistance of counsel as a due process violation because he did not argue it before the BIA conflicts with decisions of other United States Courts of Appeals, as well as with other decisions within the Ninth Circuit.

## B. Relevant Facts

Petitioner is a native citizen of the People's Republic of China and a practitioner of Falun Gong who has suffered past persecution, including detainment and violent torture, at the hands of the Chinese authorities. Petitioner fled from China and entered the United States on September 3, 1998, seeking asylum, withholding of removal, or protection under the Convention Against Torture ("CAT"). If forced to return to the Chinese mainland, Petitioner fears further maltreatment at the hands of Chinese police officers, colleagues at work, and members of his local

community based on his continuing alignment with the Falun Gong movement.

In late July or early August of 1999, less than a year after his arrival in the United States, Petitioner sought legal representation in order to prepare his application for asylum, withholding of removal, and protection under CAT. On August 22, 1999, Petitioner retained Attorney Judy Chang to file all necessary paperwork on his behalf with the Immigration and Naturalization Service ("INS" – now called U.S. Citizenship and Immigration Services) in a timely fashion (i.e. by September 3, 1999). *See* 8 U.S.C. § 1158(a)(2)(B) (2008). However, Petitioner later discovered (after the one year application period had expired) that Chang had not filed his paperwork by the applicable deadline, but had instead waited until September 27, 1999 to provide Petitioner with the proper documentation for his signature, and even then did not place those documents on record with the INS until November 1, 1999.

The INS subsequently served Petitioner with a Notice to Appear on January 6, 2000, charging him with non-possession of valid travel documents. Petitioner appeared *pro se* at his first scheduled hearing, but later retained a second attorney, Patricia Boag, to represent him. On March 24, 2000, Petitioner, through Boag, admitted the allegations in the Notice to Appear and sought, alternatively, asylum, withholding of removal, or CAT relief.

Fifteen months later, at a hearing held on August 2, 2001, Attorney Boag announced that she wished to withdraw as counsel because of her inability to communicate in Petitioner's native language (Mandarin). The IJ ordered Boag to continue the representation. However, following an off-the-record discussion, Boag complained to the IJ that an unnamed member of her staff suspected that the representations contained in Petitioner's applications were untrue, although she pointed to no instance or example of any alleged falsehood. Then, despite her insistence moments earlier that she wished to withdraw based on her inability to communicate in Mandarin, Boag suddenly claimed that Petitioner's alleged lack of truthfulness was the real reason for her request. The IJ granted Boag's new motion to withdraw, noted the possible need to recuse himself, and continued the hearing to allow Petitioner to retain a third attorney.

On January 28, 2002, Attorney David Su appeared on behalf of Petitioner at the continued hearing, but informed the IJ that he was unaware of the recusal issue. Without further input or questioning from Su, the IJ ruled that he would not recuse himself in Petitioner's case. Attorney Su did not raise any objections to the IJ's conclusion regarding recusal, nor did he object to the propriety of the conduct displayed by either of Petitioner's two previous attorneys.

At trial, the IJ made an adverse credibility determination against Petitioner because of his failure to recite Falun Gong verses and because of alleged discrepancies in Petitioner's testimony. His

third attorney (Su) failed to challenge the determination. On July 1, 2003, the IJ denied Petitioner's applications for asylum, withholding of removal, and protection under CAT. In addition to the credibility finding, the IJ found that Petitioner failed to demonstrate "extraordinary circumstances" that would justify an exception to the one year deadline for filing.

Petitioner subsequently appealed to the BIA, at which he was again represented by Attorney Su. Su's brief to the BIA did not contain any reference to the ineffective assistance provided by Petitioner's previous attorneys. Moreover, Su's brief (not surprisingly) failed to address Attorney Su's failure to challenge the ineffective assistance provided by Petitioner's attorneys before the IJ. On July 15, 2004, the BIA affirmed the IJ's decision, without opinion, pursuant to 8 C.F.R. § 1003.1(e)(4) (App. C).

Petitioner appealed the order of the BIA to the Ninth Circuit on August 9, 2004. On January 5, 2009, following oral argument, the Panel issued a memorandum opinion rejecting Petitioner's request for asylum, withholding of removal, or protection under CAT (App. B). The Panel found that the Ninth Circuit lacked jurisdiction to review the determination by the BIA that Li's application for asylum was time-barred. In addition, the Panel ruled that Li's due process concerns regarding the ineffective assistance of counsel were ineligible for review because they had not been administratively exhausted before the BIA. Finally, the Court held that the IJ properly tested the

scope of Li's understanding of Falun Gong and correctly based his credibility assessment on Li's lack of knowledge regarding his religion.

Petitioner moved for Rehearing *en banc* on February 19, 2009. On May 7, 2009, the Panel denied the Petition for Rehearing and amended its January 5 memorandum opinion to dismiss Petitioner's claim that extraordinary circumstances allow tolling of the one year deadline on the ground that the facts underlying the claim are in dispute (App. A).

## REASONS FOR GRANTING THE WRIT

### I. The Ninth Circuit Erred in Concluding That It Was Barred From Reviewing Petitioner's Due Process Claim Where the BIA Did Not Have Jurisdiction to Remedy Petitioner's Claim.

Section 242 of the Immigration and Nationality Act requires that an alien challenging a removal order exhaust all administrative remedies prior to seeking judicial review by a Court of Appeals. 8 U.S.C. § 1252(d)(1). However, the Ninth Circuit has recognized that "the principle of exhaustion may exclude certain constitutional challenges that are not within the competence of administrative agencies to decide. . . . Among such challenges may be due process claims, but only if they involve more than 'mere procedural error' that an administrative tribunal could remedy." *Barron v. Ashcroft*, 358 F.3d

674, 678 (9th Cir. 2003). *See also Vargas v. INS*, 831 F.2d 906, 908 (9th Cir. 1987) ("[D]ue process claims generally are exempt from this procedural rule because the BIA does not have jurisdiction to adjudicate constitutional issues.") (internal citations omitted).

Petitioner's ineffective assistance of counsel claim falls within this exception because it rises to the level of a due process violation that the BIA could not have remedied. Petitioner was prevented from reasonably presenting his case on more than one occasion. First, Petitioner was barred from pursuing his asylum claim because his first attorney failed to file his application within the requisite one year period. Even if Petitioner had raised this argument at the BIA level, the BIA would have lacked jurisdiction to consider whether Petitioner's due process rights had been violated because the ineffectiveness was more than a mere procedural error and was not cognizable at the administrative level.

Ineffective assistance of counsel is a due process violation, rather than a mere procedural error, if an immigration proceeding is "so fundamentally unfair that the alien is prevented from reasonably presenting his case." *Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005) (internal citations omitted). Petitioner's case is analogous to *Wang v. Reno*, 81 F.3d 808, 814 (9th Cir. 1996), in which the Ninth Circuit stated that "because Wang's action does not implicate the [Immigration and Nationality Act], let alone involve review of an order of deportation or exclusion, we conclude that he was not statutorily

required to exhaust his administrative remedies prior to seeking judicial relief for the violation of his due process rights."

Like the claim in *Wang*, Petitioner's claim is constitutional and unrelated to any statute or procedure. *See id.* ("Wang's claim, a violation of the Fifth Amendment as opposed to a statutory entitlement to asylum, falls out of the INA's scope."). The BIA has no particular expertise on the subject of ineffective assistance of counsel and the claim is not one that is generally under the BIA's charge. *See id.* at 815 ("Requiring exhaustion here would not serve 'the twin purposes of protecting administrative agency authority and promoting judicial efficiency.'"). Thus, Petitioner need not have raised his claim before the BIA because it was constitutional, rather than procedural.

## II. The Ninth Circuit Erred in Faulting Petitioner for Failing to Raise Ineffective Assistance of Counsel at the BIA Where the Attorney Representing Him at the BIA Was the Same Attorney Who Failed to Provide Effective Assistance of Counsel Below.

In addition to erroneously penalizing Petitioner for failing to exhaust remedies that the BIA could not grant, the Ninth Circuit further erred by faulting Petitioner for his third attorney's failure to raise ineffective assistance of counsel at the BIA. Petitioner could not have raised the issue in front of the BIA where his counsel continued to be ineffective. The same attorney that represented Petitioner before the

IJ again represented him at the BIA and Petitioner lacked the qualifications necessary to determine the effectiveness of the counsel he had retained. Further, the attorney himself understandably either had no incentive or saw no reason to raise ineffective assistance of counsel concerning his own prior representation of Petitioner.

In *Barron*, on which the Panel relied in dismissing Petitioner's due process claim, the court held that the alleged error – absence of counsel – could have been remedied by the BIA if petitioners had raised the issue, "the BIA could simply have ordered a rehearing with counsel present." *Barron*, 358 F.3d at 678.

The facts in *Barron*, however, are easily distinguishable from this case. In *Barron*, the issue was much less complex: petitioners' attorney was not present at the hearing. *Id.* at 676. It was not unreasonable to expect the petitioners in that case to identify counsel's absence as a problem and to raise it to the BIA. Here, on the other hand, Petitioner relied on his three prior attorneys to represent him to the best of their abilities. Petitioner, a native Mandarin-speaker with little knowledge of the English language or American law, cannot have been expected to be familiar with an ineffective assistance of counsel claim, much less the requirement that he raise it in front of the BIA. That was the responsibility of his third attorney. The attorney's failure to raise the claim is part of the due process violation itself and therefore could not have been corrected by the BIA.

Second, Petitioner was unable to argue ineffective assistance of counsel for his first attorney's failure to file the asylum application because both subsequent attorneys were also ineffective and failed to raise the issue at the administrative level. As a result of these omissions, Petitioner was deprived of his due process right to competent representation, and therefore, his claim falls within the exhaustion exception.

## III. There Is Conflicting Authority in the Circuits and Within the Ninth Circuit as to Whether a Due Process Claim of Ineffective Assistance Must Be Administratively Exhausted Before the BIA.

There is conflicting authority within the Ninth Circuit on the issue of whether ineffective assistance of counsel must be raised before the BIA. Despite the fact that *Barron* involved an absence of counsel, the Ninth Circuit cited *Barron* for the proposition that a due process claim of ineffective assistance of counsel not raised before the BIA may not be reviewed by a Court of Appeals. In another case, however, the Ninth Circuit held that a petitioner who receives ineffective assistance of counsel before the BIA may unequivocally raise this due process violation for the first time in his or her appeal to the Ninth Circuit. *Granados v. Keisler*, 252 Fed. App'x 851, 853 (9th Cir. 2007).

Likewise, at least one district court in the Ninth Circuit has held that a claim of ineffective assistance

of counsel extends "beyond easily correctable procedural issues in the deportation hearing" and heard the claim despite the Petitioner's failure to exhaust administrative remedies. *Saba v. INS*, 52 F. Supp. 2d 1117, 1124 (N.D. Cal. 1999).

Moreover, the Ninth Circuit's judgment in this case conflicts with authority in at least one other Circuit. In *Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994), for example, the Second Circuit held that "the BIA does not have jurisdiction to adjudicate the issue of ineffective assistance of counsel" and heard the Petitioner's ineffective assistance of counsel claim where it was not raised before the BIA. *See also Lopez de Jesus v. INS*, 312 F.3d 155, 162 n. 47 (7th Cir. 2002) ("[W]hen a petitioner's due process claim does not assert a procedural error correctable by the BIA, it is not subject to an exhaustion requirement). *See generally California v. American Stores Co.*, 492 U.S. 1301, 1305-06 (1989) (holding that there was a reasonable probability that the petition for a writ of certiorari would be granted where there was confusion surrounding the issue amongst both the Circuit and district courts). Thus, because there is a split in the Circuits and confusion within the Ninth Circuit, Petitioner respectfully petitions this Court to grant certiorari.

## CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's petition for a writ of certiorari.

Respectfully submitted,

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**APPENDIX A**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| JINGHAI LI,<br>Petitioner,<br>v.<br>ERIC H. HOLDER, JR., Attorney General,<br>Respondent. | No. 04-73949<br>[Alien Number Omitted In Printing]<br>ORDER<br>(Filed May 7, 2009) |

Before: FERNANDEZ, CALLAHAN and IKUTA, Circuit Judges.

The memorandum disposition filed on January 5, 2009 is amended in one regard. The sentence:

> Li's claim that he started to work on his application within one year of his entry does not excuse his failure to file within one year, and he failed to show extraordinary circumstances permitting tolling of the one year deadline.

on page 2, lines 7-10, is deleted and the following is inserted:

> Li's claim that he started to work on his application within one year of his entry does not excuse his failure to file within one year, and the facts underlying Li's claim that

extraordinary circumstances allow tolling of the one-year deadline are in dispute. *Cf. Husyev v. Mukasey,* 528 F.3d 1172, 1179 (9th Cir. 2008).

With this amendment, the panel has voted to deny the Petition for Rehearing. Judge Callahan and Judge Ikuta have voted to deny the Petition for Rehearing En Banc, and Judge Fernandez so recommends. The full court has been advised of the Petition for Rehearing En Banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing and the Petition for Rehearing En Banc are DENIED. No further petitions shall be entertained.

**APPENDIX B**

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| JINGHAI LI,<br>Petitioner,<br>v.<br>MICHAEL B. MUKASEY<br>Attorney General,<br>Respondent. | No. 04-73949<br>[Alien Number Omitted In Printing]<br>MEMORANDUM*<br>(Filed Jan. 5 , 2009) |

On Petition for Review of an Order of the Board of Immigration Appeals

Argued and Submitted October 21, 2008
Pasadena, California

Before: FERNANDEZ, CALLAHAN and IKUTA, Circuit Judges.

Jinghai Li, a native and citizen of China, petitions for review of the Board of Immigration Appeals' ("BIA") summary affirmance of the Immigration Judge's ("IJ") denial of his applications for asylum, withholding of removal, and relief under the Convention Against

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Torture ("CAT"). We have jurisdiction pursuant to 8 U.S.C. § 1252.[1]

Pursuant to 8 U.S.C. § 1158(a)(3), we do not have jurisdiction to review the BIA's discretionary determination that an asylum application was untimely filed. *Hakeem v. INS,* 273 F.3d 812, 815 (9th Cir. 2001). Li admits he filed his asylum application on November 1, 1999, which was more than one year after his entry to the United States on September 3, 1998. Li's claim that he started to work on his application within one year of his entry does not excuse his failure to file within one year, and he failed to show extraordinary circumstances permitting tolling of the one year deadline.

The BIA denied Li relief because it found that he was not credible. We review the BIA's determination for substantial evidence. *Kumar v. Gonzales,* 444 F.3d 1043, 1049 (9th Cir. 2006). We must affirm the BIA unless we are compelled to find otherwise. *Singh v. Gonzales,* 439 F.3d 1100, 1110 (9th Cir. 2006); *Wang v. INS,* 352 F.3d 1250, 1257 (9th Cir. 2003). We find that Li's inconsistent written statements and oral testimony concerning the duration of his incarceration and his conversation with Master Li are material and go to the heart of Li's claim. *Goel v. Gonzales,* 490 F.3d 735, 739 (9th Cir. 2007). Reviewing

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[1] Because the parties are familiar with the facts and procedural history, we do not restate them here except as necessary to explain our disposition.

the IJ's determination concerning Li's knowledge of Falun Gong in light of our recent decision in *Cosa v. Mukasey,* 543 F.3d 1066 (9th Cir. 2008), we find that the IJ properly tested the scope of Li's understanding of his religion and based his adverse credibility finding on Li's admitted lack of knowledge of Falun Gong. *See id.* at 1070. In any event, even if this basis for the IJ's adverse credibility finding is discounted, there is still substantial evidence in the record to support the BIA's adverse credibility finding.

Accordingly, Li's claim for withholding of removal fails because the IJ's adverse credibility determination is supported by substantial evidence. Li's CAT claim also is denied because it is based on the same evidence that the BIA found not credible. *Farah v. Ashcroft,* 348 F.3d 1153, 1156-57 (9th Cir. 2003). Finally, Li is not entitled to relief on his procedural due process claims concerning ineffective assistance of counsel, judicial bias, and translation difficulties. These claims were not raised before the BIA, thereby barring review by this court. *Barron v. Ashcroft,* 358 F.3d 674, 677-78 (9th Cir. 2004).

**DISMISSED IN PART; DENIED IN PART.**

## APPENDIX C

**U.S. Department of Justice**
**Executive Office for Immigration Review**

**Falls Church, Virginia 22041**

**Decision of the Board of Immigration Appeals**

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File: [Alien Number Omitted In Printing] – LOS ANGELES

Date: Jul 15, 2004

In re: LI, JINGHAI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Su, David Z., Esquire

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R.

§§ 1240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ [Illegible]
FOR THE BOARD

## APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
Los Angeles, California

[Alien Number Omitted In Printing] July 1, 2003

In the Matter of

| | | |
|---|---|---|
| JINGHAI LI, | ) | IN REMOVAL |
| | ) | PROCEEDINGS |
| Respondent | ) | |
| | ) | |

CHARGE: Section 237(a)(1)(A).

APPLICATIONS: Asylum; withholding of removal to China pursuant to Section 241(b)(3) of the Act; withholding of removal to China pursuant to Article 3 of the Convention Against Torture; voluntary departure in lieu of removal.

| ON BEHALF OF THE RESPONDENT: | ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY: |
|---|---|
| David Su, Esquire | Nancy DeFrank, Assistant District Counsel |

## ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 48-year-old male alien, native and citizen of China, who was admitted to the United States at San Ysidro, California, on September 3, 1998, without then possessing and presenting a valid immigrant visa, re-entry permit, border crossing identification card, or other valid entry document required by the Act. In pleading to the Notice to Appear (Exhibit 1), respondent admitted the four factual allegations, while conceding, and I'm satisfied that's the removable on the charge set forth therein. The respondent declined to designate a country of removal, I directed removal to People's Republic of China. The respondent pursued an application for asylum and for withholding of his removal to China. That application was filed on Form 1-589 and included a number of supporting documents. (Collective Exhibit Number 2). The application was initially filed with the then Immigration and Naturalization Service on November 1, 1999. *See* Exhibit Numbers 2 and 3. The INS forwarded a copy of the application packet to the State Department on November 3, 1999 and the State Department has provided no response. *See* Exhibit Number 3. A number of background documents were submitted by the respondent. (Collective Exhibit Number 4). The Government presented the State Department's then latest report. It was the February 2001 report for China. (Exhibit Number 5). Additional supporting documents have been submitted by the respondent. (Collective Exhibit

Number 6). The Court sustained the Government's objection to the admission of those documents, which were marked as Exhibit Number 7 for identification purposes only. The Government's inconclusive forensic document laboratory report is admitted as Exhibit Number 8. The respondent also testified in support of his applications for relief. (The Court notes that the Court has placed no weight upon the information provided by Ms. Boag prior to the Court's granting her request to withdraw as counsel in this case. In other words, in reaching its decision today, the Court has not relied upon any of the information that Ms. Boag made reference to at the time she moved to withdraw as counsel of record in this matter. The Court's decision is based entirely upon the evidence presented by the respondent; that is, the documentary evidence presented and the testimony that was taken during the course of the merits hearing.)

The above-evidence reflects the following:

Respondent testified that he was born in Shanghai, China, that he worked in China as a taxi driver and also as a salesman for a clothing company. Respondent is married and has one child. His wife, who also practiced Falun Gong at one time, and their child have remained in China. There's no indication that those two individuals have any problem in China. Respondent departed China on August 20, 1998, and arrived in the United States on September 3, 1998. Respondent explained his reasons for leaving China as follows:

In 1994, respondent began to practice Falun Gong. In March 1994, respondent went to Chang Chun to take a one week Falun Gong class run by Master Li. Respondent testified that he did not talk to Master Li, but saw him at this class. Following the completion of this class, respondent returned to Shanghai where he practiced Falun Gong with groups of 7, 8, 10, as many as 12 people, at various homes in the neighborhood. Respondent practiced Falun Gong two to three times a week. Respondent's wife and friends also practiced Falun Gong. In August 1994, two officers from the neighborhood committee came to respondent's home. The two officers were accompanied by two policemen. At the time, there were some eight people practicing Falun Gong in respondent's home. The respondent was arrested on this occasion and was detained for 11 days time. During this 11-day detainment, the police indicated that respondent should not practice Falun Gong. Respondent answered the police indicating that he and others practiced Falun Gong for their health. The police indicated that it was an illegal gathering. Respondent again mentioned it was helpful to his health. The police beat the respondent on three occasions during the 11-day detainment using a baton. Following his release, respondent returned to work, but the work unit became suspicious of the respondent and watched him due to the earlier detainment. Eventually, respondent's company fired him. Following respondent's release from the detainment, he continued to practice Falun Gong. Following the loss of his job, he found odd jobs. The

neighborhood committee officers, however, continued to watch the respondent and even came to respondent's home. After respondent's August 1998 departure from China, the neighborhood committee officers continued to come to respondent's home, ask about respondent's location. Respondent claims that if he returns to China at this time, he thinks he will be arrested, as the Chinese government continues its crackdown of the Falun Gong Movement. Respondent testified that he practices Falun Gong in a small park in Alhambra, also, at the homes of friends, and in his own home. Respondent indicated that he first applied for asylum in August 1999. Subsequent questions and responses to those questions indicate that respondent began the process of applying for asylum with the help of a friend in July and August 1999. Respondent identified this friend as being a Mr. Lee. Respondent does not recall the name of this friend or the complete name of this friend, and that is his first name because the gentleman was not a close friend. Respondent does not know the city where this friend lived at the time that respondent had this acquaintance with the friend and began the process of applying for asylum. Respondent also indicates that this Mr. Lee, this friend who initially helped respondent with the asylum process, has now returned to China. Respondent also referred to two documents, which were included as part of, I guess it was Exhibit Number 6, actually. Yes, Exhibit Number 6, tabs E and F. He seems to indicate that he paid the sum of $1500 in August 2, 1999, that the sum of money was

paid to Judy Chang for purposes of preparing the application for asylum.

To be eligible for asylum under Section 208 of the Act, an alien must meet the definition of a "refugee", which requires the alien to show persecution or a well-founded fear of persecution in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion. To be eligible for withholding of removal under Section 241(b) (3) of the Act, an alien's facts must show a clear probability of persecution in the country designated for removal on account of any one of the five statutory grounds. The alien bears the evidentiary burdens of proof and persuasion in any application for asylum under Section 208 of the Act and withholding of removal under Section 241(b) (3) of the Act. The Courts have concluded that the "well-founded fear" standard and the "clear probability" standard are different and that the former is more generous than the latter. To be eligible for withholding of removal under Article 3 of the Convention Against Torture as implemented under 8 C.F.R., Section 208.16, an alien must establish that there are substantial grounds for believing, i.e. that it is more likely than not that he would be in danger of being tortured in the country in question.

The Court finds that the respondent has presented insufficient evidence for the Court to infer that respondent has been persecuted or has a well-founded fear of persecution in China on account of his race, his religion, his nationality, his membership in a

particular social group, or his political opinion. The Court finds that respondent is not a credible witness. There are significant discrepancies between the respondent's testimony and the information provided in his written application. Discrepancies which respondent, who enjoys the burden of proof, has failed to adequately address. The first discrepancy relates to the question of whether respondent did or did not speak to Master Li at the one week course, which respondent allegedly took in Chang Chun. In his written application, respondent clearly indicates that he asked Master Li to treat his waist, that Master Li agreed to do so, and Master Li told the respondent that respondent must learn Falun Gong if he's to get rid of his waist pain permanently, that Master Li taught the respondent some simple exercises and accepted him into his correspondence class. It is clear to the Court that the respondent indicated in his written statement that he and Master Li did speak to each other, talked to each other. Yet, in his testimony respondent indicated that when first asked about this matter, that he did not talk to Master Li at the class, and when then asked about this particular matter by opposing counsel, again, he reiterated that he did not speak to Master Li. The Court asked the respondent to explain the discrepancy. Respondent brushed it aside stating that it was just a small matter and, when the Court pressed for a better explanation with respect to the discrepancy, respondent indicated that he does not understand what the Court means by the word "speak". The Court finds the respondent's explanation for the discrepancy wanting. Not only is

the explanation wanting, it lacks credibility. The next serious discrepancy pertains to the length of the detainment. Respondent, in his testimony, indicated that he was detained in August 1994 for 11 days' time. Initially, he stated, for more than 10 days. The Court asked the respondent to be more specific. Eventually, he stated he was detained for 11 days' time. He reconfirmed that it was 11 days' time later in his testimony, yet in his written statement, he clearly indicates that he was detained for more than three weeks time. The discrepancy is evident and it is serious in that it relates to the only time of alleged physical abuse of this respondent by Chinese government authorities. The Court has additional reason to question the credibility of the respondent's testimony and the underlying basis of his claim. The respondent, who acknowledges that the Falun Gong practice exercise program involves some five exercises. Respondent acknowledges that he also indicates that each one of these exercises has several motions and that there are words for each of the motions. When the respondent was asked to state the verse, the words, recite it before the second exercise, that is, the Falun Standing Stance Exercise, respondent acknowledged that he did not know the words to that particular exercise. The Court notes that the respondent indicates that he has been practicing Falun Gong on a regular basis since 1994, that he did so in China, and that he continued to do so following his arrival in the United States in 1998. Respondent claims to have perform these exercises, both solo, on his own, and in the privacy of his home, and with

groups, groups of 7, 8, 10, 12 people, two to three times a week in China in his own home and in the homes of his friends in the United States. Given the fact that there are good reasons to question the credibility of this particular respondent, the failure to present any corroborating evidence to the fact that respondent is a practicing Falun Gong member and has been a practicing Falun Gong member further undermines the credibility of his claim. Accordingly, the Court finds that the respondent has failed to meet his burden of proof with respect to his request for asylum. Now there's an additional issue in this case. The issue goes to the matter of whether the time bar applies or not. The Court finds that this respondent is time barred from applying for asylum, to begin with, pursuant to Section 208(a)(2) of the Act. For purposes of Section 208(a)(2)(B) of the Act, an applicant for asylum has the burden of establishing (1) by clear and convincing evidence that he applied within one year of his arrival in the United States, or (2) to the satisfaction of this Court that he qualifies for an exception to the one-year deadline. The one-year period is calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later. The application for asylum may be considered if the alien demonstrates either the existence of changed circumstances, which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the prescribed period. *See* Section 208(a)(2)(D) of the Act and 8 C.F.R., Section 208.4(a)(4) and (5).

In this case, the respondent last entered the United States on September 3, 1998, and first applied for asylum on November 1, 1999. *See* Exhibit Number 2 and Exhibit Number 3. The Court further notes that the respondent signed his application at page 8, on September 27, 1999. Clearly, respondent did not apply for asylum within one year's time of his arrival in this country or April 1, 1997. Respondent has also failed to establish to the satisfaction of this Court that he falls within any exception to the one-year deadline. With respect to changed circumstances, respondent has not presented sufficient credible or objective evidence of changes in conditions in China, which materially affect his eligibility for asylum or changes in objective circumstances relating to the applicant in the United States that create a reasonable possibility that respondent may qualify for asylum. It is noted that the alleged physical abuse occurred before the respondent's arrival in the United States. Respondent had ample opportunity to address that abuse and the reason for the abuse had he filed for asylum within one year's time of his arrival in the United States. With respect to extraordinary circumstances, respondent has also failed to present sufficient credible or objective evidence of events or factors beyond the alien's control that causes failure to meet the one-year deadline. The respondent's references to having started the asylum process with the assistance of a friend in July and August 1999, is vague and unclear. He does not know the name of this friend. When unable to provide the complete name of the friend, he explained away his inability to do that

by stating that the friend was not a close friend, just an acquaintance. The respondent did not know where this friend lived, however, he understands that this friend has now returned to China. The respondent has simply been unable to provide sufficient, specific information about this friend and how that individual's involvement creates for the respondent, for purposes of this issue at least, an extraordinary circumstance. Similarly, the Court has placed little weight on the documents that respondent directed the Court's attention to. Exhibit 6, tabs E and F. The documents themselves do not add much to the respondent's explanation of what occurred. The one document is some type of receipt, but the receipt does not clearly indicate the purpose of the payment or the date of payment. The clearest date on the check is August 2, 1999, but that date appears to have been written over other writing, possibly another date. There's no indication that the respondent attempted to bring in Ms. Chang to testify about any particular problems. Respondent has just failed to meet his burden of proof. Simply failed to establish that any extraordinary circumstances exist sufficient to excuse the respondent's failure to timely file his application for asylum. Thus, the Court finds that respondent's various vague explanations do not establish extraordinary circumstances in this case.

Even assuming that respondent was not time barred, the Court has found that the respondent has failed to meet his burden of proof for the reasons previously stated and, thus, the Court finds that

respondent has failed to establish eligibility for the requested relief of asylum and I deny that application on statutory grounds.

The Court further finds that respondent has failed to establish that there is a clear probability that his life or freedom would be threatened in China on account of any of the statutory grounds found in Section 241(b) (3) of the Act. The Court further finds that respondent has failed to establish that there is substantial grounds for believing, i.e. that it is more likely than not that he would be in danger of being tortured in China. The respondent has applied for voluntary departure. I will grant him that minimal relief in the exercise of my discretion. The following orders will be entered in this case:

IT IS ORDERED that respondent's application for asylum pursuant to Section 208 of the Ace [sic] be and the same is hereby denied.

IT IS FURTHER ORDERED that respondent's application for withholding of removal to China pursuant to Section 241(b)(3) of the Act be and the same is hereby denied.

IT IS FURTHER ORDERED that respondent's application for withholding of removal to China pursuant to Article 3 of the Convention Against Torture be and the same is hereby denied.

IT IS FURTHER ORDERED that the respondent be granted voluntary departure, without expense to the Government, provided he departs the United

States on or before August 15, 2003, or any extension beyond such date granted to him by the Department of Homeland Security, and provided respondent post a $500 departure bond within five business days of the Court's decision today. If either of those conditions or provisals is not met, then an alternate order will immediately become effective, to wit: respondent shall be removed from the United States to China on the charge contained in the Notice to Appear in his case.

WILLIAM J. MARTIN, JR.
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before WILLIAM J. MARTIN, JR. in the matter of:

JINGHAI LI

[Alien Number Omitted In Printing]

Los Angeles, California

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Evelyn R. Reese
Evelyn R. Reese (Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

September 9, 2003
(Completion Date)

144

(2)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 09-157

# In the Supreme Court of the United States

JINGHAI LI, PETITIONER

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Under 8 U.S.C. 1252(d)(1), a "court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." The question presented is:

Whether the court of appeals correctly declined to review petitioner's claim of ineffective assistance of counsel, which he had not raised before the Board of Immigration Appeals, either on direct appeal or in a motion to reopen proceedings.

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# In the Supreme Court of the United States

No. 09-157

JINGHAI LI, PETITIONER

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-5), as amended (Pet. App. 1-2), is not published in the *Federal Reporter* but is reprinted in 306 Fed. Appx. 387. The decisions of the Board of Immigration Appeals (Pet. App. 6-7) and the immigration judge (Pet. App. 8-20) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on January 5, 2009. A petition for rehearing was denied on May 7, 2009 (Pet. App. 2). The petition for a writ of certiorari was filed on August 5, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, administrative proceedings about whether an alien is entitled to remain in the United States typically begin before an immigration judge. 8 U.S.C. 1229a(a). After a hearing, the immigration judge issues a decision on the alien's removability and eligibility for relief from removal. 8 U.S.C. 1229a(c)(1)(A); 8 C.F.R. 1240.12(a). If the immigration judge enters an order of removal, the statute requires the immigration judge to "inform the alien of the right to appeal that decision." 8 U.S.C. 1229a(c)(5). The Board of Immigration Appeals (Board or BIA) hears appeals from decisions of immigration judges. 8 C.F.R. 1003.1(b), 1240.15. If the Board affirms an immigration judge's order of removal, that order becomes "final." 8 U.S.C. 1101(a)(47)(B).

After a final order of removal has been issued, "[a]n alien may file one motion to reopen proceedings" before the agency. 8 U.S.C. 1229a(c)(7)(A); see 8 C.F.R. 1003.2(c)(2). Such a motion must "state the new facts that will be proven at a hearing to be held if the motion is granted" and "be supported by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); see 8 C.F.R. 1003.2(c)(1). In addition, "[t]he Board may at any time reopen * * * on its own motion any case in which it has rendered a decision." 8 C.F.R. 1003.2(a).

b. An alien may seek judicial review of a final order of removal by filing a petition for review in a United States Court of Appeals. 8 U.S.C. 1252(a)(1), (4) and (5). Under 8 U.S.C. 1252(d)(1), however, a court "may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right."

2. a. Petitioner is a Chinese native and citizen who was admitted to the United States on September 3, 1998. Pet. App. 9. He filed an application for asylum on November 1, 1999, *ibid.*, even though such an application generally must be filed "within 1 year after the date of the alien's arrival in the United States." 8 U.S.C. 1158(a)(2)(B). In January 2000, the Immigration and Naturalization Service served petitioner with a notice to appear in removal proceedings, charging him with being removable on the ground that he had been inadmissible when he entered the United States because he was not "in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document." 8 U.S.C. 1182(a)(7)(A)(i)(I), 1227(a)(1)(A); Admin. R. 488-489 (A.R.).

b. Before an immigration judge, petitioner, through counsel, admitted the factual allegations against him and conceded that he is removable. Pet. App. 9; A.R. 65. But petitioner sought relief and protection from removal. He requested an adjudication of his previously filed application for asylum, which included applications for withholding of removal under 8 U.S.C. 1231(b)(3)(A), and for protection from removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

At a subsequent hearing, petitioner's counsel moved to withdraw from representing petitioner, and when pressed for a reason, told the immigration judge that she had been informed by an attorney in her office that petitioner had indicated that the basis for his asylum application was not true. A.R. 103-104. The immigration judge granted the motion to withdraw and said he

would consider whether he should recuse himself from the matter. A.R. 105. The immigration judge granted a three-month continuance to enable petitioner to obtain new counsel. *Ibid.* When petitioner appeared with new counsel at a later hearing, the immigration judge concluded that it was unnecessary to recuse himself and granted a further continuance to allow new counsel more time to prepare. A.R. 112-115.

c. On July 1, 2003, the immigration judge held a hearing in which he received documentary evidence and heard testimony from petitioner. A.R. 124-163. Petitioner testified that he had begun to practice Falun Gong in China, and that he had been arrested, detained for 11 days, and beaten three times by police officers who told him that he should not practice Falun Gong and that the meetings he was having two to three times a week with groups of 7 to 12 people were illegal gatherings. Pet. App. 11. Petitioner also testified that, as a consequence of his detention, he was terminated from his job, and that he feared that if he returned to China, he would be arrested. *Id.* at 11-12.

d. In an oral decision, the immigration judge denied each of petitioner's applications for relief. Pet. App. 8-20. The immigration judge concluded that petitioner had failed to meet his burden, for purposes of his asylum application, of proving that he had been persecuted or had a well-founded fear of being persecuted, should he return to China, on account of any of the protected grounds set forth in 8 U.S.C. 1101(a)(42)(A) and 1158(b)(1)(B)(i). Pet. App. 13, 16. The immigration judge found petitioner was not a credible witness, noting that there were significant discrepancies between his oral testimony and the information provided in his writ-

ten application, which petitioner had not been able to explain at the hearing. *Id.* at 14-16.

In addition to rejecting petitioner's asylum application on the merits, Pet. App. 18-19, the immigration judge also determined that the application had not been filed within the one-year time limit, and that petitioner had failed to establish that he had been prevented from meeting the time limit by "extraordinary circumstances," since his explanations about having hired a "friend" or "acquaintance" to help him with the application in July or August 1999 were too "various" and "vague." *Id.* at 16-18.

With respect to petitioner's application for withholding of removal, the immigration judge found that petitioner had failed to establish that there is a clear probability that his life or freedom would be threatened in China on account of any of the statutory grounds set forth in 8 U.S.C. 1231(b)(3). Pet. App. 19. Similarly, the immigration judge denied the application for CAT protection because petitioner had failed to establish that there were substantial grounds for believing he would be in danger of being tortured upon his return to China. *Ibid.*

The immigration judge granted petitioner's application for voluntary departure. Pet. App. 19.

3. Petitioner appealed the immigration judge's decision to the Board. A.R. 29-31. He argued that the immigration judge erred in ruling that he had failed to establish extraordinary circumstances justifying an exception from the one-year limit on asylum applications, in making an adverse credibility determination, and in excluding from evidence certain documents he had submitted. A.R. 12-16.

In accordance with 8 C.F.R. 1003.1(e)(4), the Board affirmed the immigration judge's decision without opinion. Pet. App. 6-7.

4. Petitioner filed a petition for review in the court of appeals. Pet. App. 3. After the case had been briefed, the court appointed pro bono counsel for petitioner, and the case was re-briefed and argued. 04-73949 Docket entry Nos. 26, 29, 33, 38, 40, 47 (9th Cir. Oct. 29, 2007 to Oct. 21, 2008).

Through his new counsel, petitioner argued that his asylum application should be granted because the record supported his claims to have suffered past persecution and to have a well-founded fear of future persecution, and because he had retained counsel to file his asylum application before the one-year time limit expired. Pet. C.A. Replacement Br. 13-16. With respect to his applications for withholding of removal and CAT protection, petitioner argued that his testimony had been credible and established a clear probability that he would be persecuted or tortured if he returned to China. *Id.* at 16-21. Finally, petitioner argued that his due process rights had been violated by the immigration judge's consideration of extra-record evidence and failure to recuse himself; by translation difficulties at the hearing; and by the provision of ineffective assistance by the attorneys who had filed petitioner's asylum application and represented petitioner before the immigration judge and the Board. *Id.* at 21-27.

The court of appeals, in an unpublished memorandum disposition, partly denied the petition for review and partly dismissed it for lack of jurisdiction. The court first concluded that it lacked jurisdiction to review the Board's discretionary determination that the asylum application was not timely filed, and that the facts un-

derlying his claim that the one-year time limit should be tolled were in dispute. Pet. App. 1-2, 4.

The court of appeals held that there was substantial evidence in the record to support the Board's adverse credibility finding—even discounting the immigration judge's reliance on extra-record evidence about tenets of Falun Gong that petitioner did not know. Pet. App. 4-5. The court noted that inconsistencies between petitioner's written statements and oral testimony were "material" and went "to the heart of [his] claim." *Id.* at 4. In light of the adverse credibility determination, the court concluded that the applications for withholding of removal and CAT protection had been properly denied. *Id.* at 5.

The court of appeals held that its review of petitioner's due process claims (including his claim of ineffective assistance of counsel) was barred because "[t]hese claims were not raised before the BIA." Pet. App. 5.

## ARGUMENT

In this Court, petitioner does not challenge the court of appeals' decision that it lacked jurisdiction to review the denial of his asylum application as untimely, Pet. App. 4, or its decision that there was substantial evidence to support the adverse credibility findings that justified the denial of his applications for withholding of removal and for relief under the Convention Against Torture, *id.* at 4-5. Nor does petitioner re-assert his claims (Pet. C.A. Replacement Br. 21-25, 26-27) that the immigration judge inappropriately relied on extra-record evidence about Falun Gong or that the removal hearing was rendered unfair by translation difficulties or the immigration judge's failure to recuse.

Instead, petitioner now challenges (Pet. 7-12) only the court of appeals' decision not to address "his procedural due process claim[] concerning ineffective assistance of counsel" because that claim was "not raised before the BIA." Pet. App. 5. Petitioner contends that he should not have been required to exhaust his administrative remedies for two reasons: because the Board did not have the power to remedy his claim of ineffective assistance of counsel (Pet. 7-9), and because he was still being represented by allegedly ineffective counsel during the proceedings before the Board (Pet. 9-11). The decision of the court of appeals is correct and does not conflict with decisions from this Court or other courts of appeals. Accordingly, further review is not warranted.

1. Petitioner concedes that "an alien challenging a removal order" is statutorily required to "exhaust all administrative remedies prior to seeking judicial review by a [c]ourt of [a]ppeals." Pet. 7 (citing 8 U.S.C. 1252(d)(1)). But he contends that his case falls within a general exception for "certain constitutional challenges that are not within the competence of administrative agencies to decide." *Ibid.* (quoting *Barron* v. *Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004)).

Assuming *arguendo* that Section 1252(d)(1) is amenable to an exception for claims outside the agency's competence, that exception would not apply to petitioner's claim of ineffective assistance of counsel. The Board has long had procedures for considering (and granting relief on the basis of) ineffective-assistance claims. See *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A.), review denied, 857 F.2d 10 (1st Cir. 1988). In *Lozada*, the Board established the procedural requirements for filing a motion to reopen deportation proceedings (now called removal proceedings) based upon a claim of ineffective assistance

of counsel and required an alien to show that he was prejudiced by the action or inaction of his counsel. *Id.* at 639-640. In 2003, the Board, sitting en banc, reaffirmed that framework. See *In re Assaad*, 23 I. & N. Dec. 553.[1] Thus, petitioner errs in asserting (Pet. 8) that an ineffective-assistance claim like his "was not cognizable at the administrative level."

Because the Board can provide relief for claims of ineffective assistance of counsel that arise in removal proceedings, the courts of appeals have routinely—and correctly—held that they would not recognize an "exception" from the INA's statutory "exhaustion requirement for claims of ineffective assistance of counsel not raised before the BIA." *Goonsuwan* v. *Ashcroft*, 252 F.3d 383, 390 (5th Cir. 2001); see also, *e.g.*, *Lubale* v. *Gonzales*, 484 F.3d 1078, 1081 (8th Cir. 2007) (holding that an alien's "failure to assert his ineffective assistance claim before the BIA precludes judicial review"); *Bernal-Vallejo* v. *INS*, 195 F.3d 56, 64 (1st Cir. 1999) ("We decline to review the ineffective assistance claim because [the alien] has failed to exhaust his administrative remedies."); *Akinwunmi* v. *INS*, 194 F.3d 1340, 1341 (10th Cir. 1999) ("We have held that because the BIA provides a mechanism for hearing an ineffective assistance claim, an alien's failure to raise the claim to the BIA deprives this court of jurisdiction to review it."); *Stewart* v. *United States INS*, 181 F.3d 587, 596 (4th Cir. 1999) ("Because [the alien] failed properly to

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[1] Earlier this year, the Attorney General ordered the initiation of a Department of Justice rulemaking to evaluate whether the procedural factors from *Lozada* that currently govern the Board's administrative resolution of claims of ineffective assistance of counsel in immigration proceedings should be revised. See *In re Compean*, 25 I. & N. Dec. 1, 3 (2009).

make a claim of ineffective assistance of counsel to the BIA, this Court cannot consider the claim."); *Mojsilovic* v. *INS*, 156 F.3d 743, 748 (7th Cir. 1998) ("[W]e lack jurisdiction over [the alien's] ineffective assistance claim because she did not raise it before the Board."); *Arango-Aradondo* v. *INS*, 13 F.3d 610, 614 (2d Cir. 1994) (declining to address an ineffective-assistance claim because the Board had not had a chance to consider it).

Petitioner contends (Pet. 12) that the decision below "conflicts" with the Second Circuit's decision in *Rabiu* v. *INS*, 41 F.3d 879 (1994). There is, however, no conflict. As the Second Circuit itself has explained, its opinion in *Rabiu* "explicitly recognized that the BIA should consider ineffectiveness claims in the first instance in order to 'avoid any premature interference with the agency's processes.'" *Zheng* v. *United States Dep't of Justice*, 409 F.3d 43, 46 (2005) (quoting *Rabiu*, 41 F.3d at 882). In *Rabiu*, the court of appeals was able to consider the alien's claim of ineffective assistance of counsel only because that claim was "part of the administrative record before the Board when it * * * considered his motion to reopen," and thus the agency had "considered the facts * * * and provided its expertise." 41 F.3d at 882. Petitioner here does not (and cannot) claim that the Board has already satisfied the purposes of the exhaustion requirement by "consider[ing] [his] ineffectiveness claims in the first instance." *Zheng*, 409 F.3d at 46.[2]

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[2] Petitioner also cites *Lopez de Jesus* v. *INS*, 312 F.3d 155, 162 n.47 (5th Cir. 2002), for the general proposition that exhaustion is not required when an alien's "due process claim does not assert a procedural error correctable by the BIA." Pet. 12. That case, however, involved a constitutional question about the retroactive application of a statutory amendment, rather than a claim of ineffective assistance of counsel. *Lopez de Jesus*, 312 F.3d at 162. The Fifth Circuit has made it clear that a general exception to exhaustion for circumstances in which ad-

Accordingly, there is no basis for further review of the first question presented by the petition.

2. Petitioner also contends (Pet. 9-11) that the court of appeals should not have required him to raise his ineffective-assistance claim in proceedings before the Board, because the attorney who represented him during his appeal to the Board was one of the attorneys who he now alleges provided him with ineffective assistance before the immigration judge. Petitioner cites no case supporting such a categorical exception to the exhaustion requirement.

Although petitioner was still represented by the same counsel during his appeal to the Board as during his removal hearing, his direct appeal was not his only opportunity to present his ineffective-assistance claim to the Board. To the contrary, such claims are most often presented in the context of motions to the Board to reopen proceedings, which are authorized by statute and regulation. See 8 U.S.C. 1229a(c)(7); 8 C.F.R. 1003.2(c). Accordingly, the Ninth Circuit has repeatedly refused to entertain aliens' claims of ineffective assistance when those claims had not already been presented to the Board in motions to reopen. See, *e.g.*, *Rashtabadi* v. *INS*, 23 F.3d 1562, 1567 (1994) ("To the extent that [the alien] argues that because he was represented on appeal [to the Board] by the same counsel who represented him at his deportation hearing, he could not raise his * * * claim, he can move the Board to reopen his appeal.") (citing prior cases); *Liu* v. *Waters*, 55 F.3d 421, 426 (1995) ("[W]e hold that [the alien] must first make a motion to reopen, with new counsel, if necessary, citing

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ministrative remedies are inadequate is "inapplicable" to claims of ineffective assistance before the Board—even when they are "couched in terms of a due process violation." *Goonsuwan*, 252 F.3d at 389.

ineffective assistance of counsel as his reason for failing to raise the claim earlier."); see also Gov't C.A. Replacement Br. 24 n.4 (noting that petitioner had not filed a motion to reopen asserting his ineffective-assistance claim).[3]

Other courts of appeals too have generally required an alien to "present his claim of ineffective assistance of counsel to the BIA, either on direct appeal *or through a motion to reopen.*" *Goonsuwan*, 252 F.3d at 390 (emphasis added); see also, *e.g.*, *Etchu-Njang* v. *Gonzales*, 403 F.3d 577, 584-585 (8th Cir. 2005) (finding no "good reason to excuse the issue exhaustion requirement" when petitioner's second attorney could have presented an ineffective-assistance claim with regard to his first

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[3] Petitioner characterizes the Ninth Circuit's unpublished decision in *Granados* v. *Keisler*, 252 Fed. Appx. 851 (2007), as having "held that a petitioner who receives ineffective assistance of counsel before the BIA may unequivocally raise this due process violation for the first time in his or her appeal to the Ninth Circuit." Pet. 11. But aside from lacking precedential force, *Granados* is distinguishable, because it addressed a claim of ineffective assistance that arose from alleged incompetence in the course of filing the motion to reopen itself. 252 Fed. Appx. at 853. Indeed, the case on which *Granados* relied had expressly distinguished itself from cases "where, without excuse, no motion to reopen was ever filed." *Granados-Oseguera* v. *Gonzales*, 464 F.3d 993, 997 n.5 (9th Cir. 2006), withdrawn and superseded on other grounds by *Granados-Oseguera* v. *Mukasey*, 546 F.3d 1011 (9th Cir. 2008). Because no motion to reopen was ever filed in petitioner's case, he was not permitted to raise his claim for the first time in the court of appeals.

Petitioner also compares (Pet. 8-9) his case with that of the alien in *Wang* v. *Reno*, 81 F.3d 808 (9th Cir. 1996), but *Wang* did not involve a claim of ineffective assistance of counsel. Indeed, the Ninth Circuit in *Wang* found that exhaustion of the alien's due-process claim before the Board was unnecessary because the claim did not even "involve review of an order of deportation or exclusion." *Id.* at 814. Here, by contrast, the only claim petitioner asserts arises directly from the removal proceeding against him, making *Wang*'s reasoning inapplicable.

attorney in a motion to reopen); *Bernal-Vallejo*, 195 F.3d at 64 (declining to review an ineffective-assistance claim because it had not been exhausted through a motion to reopen); *Castaneda-Suarez* v. *INS*, 993 F.2d 142, 144-145 (7th Cir. 1993) (same); *Dokic* v. *INS*, 899 F.2d 530, 532 (6th Cir. 1990) (same).

Because petitioner could have raised his ineffective-assistance claim in a motion to reopen proceedings before the Board, and the decision below does not conflict with that of any other court of appeals, further review of the second question presented is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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